

WEBINAR WEDNESDAYS



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TIPS FOR WITNESS PREPARATION AND THE USE OF TRIAL EXHIBITS

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State Bar of Arizona Ethics Opinions

01-13: Criminal Representation; Confidentiality; Witnesses; Discovery

11/2001

Prosecutors ethically may reveal substance of discussions with law enforcement witnesses; such discussions are not considered "client confidences" under ER 1.6.

FACTS[1]

The County Attorney has conducted pre-trial interviews with potential law enforcement witnesses. Defense counsel has sought disclosure of all "discussions" between law enforcement trial witnesses and the County Attorney's Office.

QUESTION PRESENTED

Whether a prosecutor may reveal the substance of discussions with law enforcement witnesses or whether that information may not be revealed as a client confidence under ER 1.6.[2]

RELEVANT ETHICAL RULES

ER 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d) or ER 3.3(a)(2).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime.

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client.

ER 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under ER 3.6.

RELEVANT ARIZONA ETHICS OPINION

Ariz. Op. 94-07

OPINION

In order to analyze whether discussions with law enforcement officials constitute client confidential information, it is first necessary to determine who is considered "the client" for purposes of ER 1.6. As stated by a leading commentator:

The office of prosecutor can best be conceptualized as a lawyer with no client but with several important constituencies. *The police are an important constituency, although for most purposes individual police officers with whom the prosecutor holds confidential meetings are not the lawyer's client.* Victims of crime are also clearly not clients . . . The emotionally satisfying statement is that the client of every prosecutor is the public. A less emotive but more realistic conceptualization is that prosecutors in a position to make policy decisions should regard the public as their client, while prosecutors in subordinate roles should regard their superiors in the office as the effective client for matters on which office policy has been set or specific directions given, unless a superior directs a subordinate lawyer to violate the law or the professional rules. (emphasis added)

C. Wolfram, *Modern Legal Ethics* § 13.10.1. See also, e.g., *Smith v. State*, 465 N.E.2d 1105, 1119 (Ind. 1984) ("The State is the client of the prosecutor. The prosecuting witnesses, including police officers, are not parties in a prosecution and no attorney-client relationship arises between a prosecutor and a police officer who may be a

witness in a criminal trial."); Restatement of the Law Governing Lawyers §§ 96, 97. The same analysis applies here. The law enforcement officials are not the prosecutor's client. Therefore, the substance of discussions between a prosecutor and law enforcement officials are not client confidences under ER 1.6.

This conclusion is also reinforced by a prior analogous ethics opinion, and the unique role that prosecuting attorneys play in our society. Arizona Opinion 94-07 analyzed a prosecutor's duty to disclose certain potential exculpatory information. The obligation to produce such information is codified in ER 3.8. In accordance with ERs 3.8 and 8.4, the Committee held a prosecutor has an obligation to notify defense counsel of the death of an officer who had testified before the grand jury. The Committee also found that in a case involving possession of a narcotic, a prosecutor must inform defense counsel while a plea offer was under consideration that evidence seized pursuant to a search warrant had been inadvertently destroyed. Finally, the Committee held that in a case involving driving under the influence of drugs a prosecutor must inform defense counsel of the lack of a urine sample for the defense to conduct an independent urine test. Thus, in all three scenarios presented the Committee felt disclosure was appropriate, consistent with the case law cited in the Opinion which noted that the obligation to disclose includes information used only to impeach government witnesses, and that courts have cautioned prosecutors to resolve doubtful questions in favor of disclosure.

Whether the substance of the discussions in this case could be potentially viewed as exculpatory is not evident from the request. To the extent a prosecutor learns of evidence or information that tends to negate guilt or mitigates the offense charged, however, a prosecutor has an obligation of disclosure under ER 3.8.

CONCLUSION

A prosecutor may ethically reveal the substance of discussions between law enforcement officials and members of the prosecutor's office, and has an absolute obligation to reveal evidence or information if it tends to negate the guilt of the accused or mitigate the offense. Such discussions are not considered client confidences under ER 1.6.

[1] Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 2001

[2] This Opinion is limited only to whether there is an ethical prohibition from revealing these discussions, and not whether any such request is proper under the Arizona Federal Rules of Criminal Procedure. Any interpretation of the discovery rules is beyond the scope of this Opinion and the purview of this Committee.

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Rules of Professional Conduct

3. Advocate

Related Opinions

ER 3.8. Special Responsibilities of a Prosecutor The

prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of any ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under ER 3.6 or this Rule.
- (g) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - (1) promptly disclose that evidence to the court in which the defendant was convicted and to the corresponding prosecutorial authority, and to defendant's counsel or, if defendant is not represented, the defendant and the indigent defense appointing authority in the jurisdiction, and

- (2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority, make reasonable efforts to inquire into the matter or to refer the matter to the appropriate law enforcement or prosecutorial agency for its investigation into the matter.
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall take appropriate steps, including giving notice to the victim, to set aside the conviction.
- (i) A prosecutor who concludes in good faith that information is not subject to subsections (g) or (h) of this Rule does not violate those subsections even if this conclusion is later determined to have been erroneous.

COMMENT

- [1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.
- [2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.
- [3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.
- [4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.
- [5] Paragraph (f) supplements ER 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with ER 3.6 (b) or (c).
- [6] Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.
- [7] Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently.